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No. 96-1246

Supreme Court, U.S.
FILED
MAR 21 1997

In The

Supreme Court of the United States

October Term, 1996

PAUL EASTERDAY,

Petitioner,

vs.

LARRY GILBERT in his individual capacity, and as Sheriff of Okaloosa County, Florida,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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Petitioner, Paul Easterday, briefly replies to the Brief in Opposition, and states:

The brief in opposition sets forth new matter in the form of a restatement of the case wherein the Respondent laboriously cites parts of the record in support of an argument that Easterday's speech was not only potentially disruptive but allegedly disruptive in fact. The District Court rendered an order on April 18, 1996, granting summary judgment for the Respondent (Petitioner's Brief, Appendix B, pp. 5a-12a), which mirrored the court's earlier order of dismissal (Appendix D) entered March 10, 1994, granting a Rule 12(b)(6), Federal Rules of Civil Procedure, motion to dismiss for failure to state a cause of action. The order to dismiss was reversed by the Eleventh Circuit. (Appendix E).

Thus, it appears clear that the District Court's *Pickering* balancing analysis when ruling on the motion for summary judgment was likely based upon the same opinion the court held prior to the reception of any evidence, as expressed in the order on motion to dismiss for failure to state a cause of action. As such, the reasoning is revealed as pretextual, revealing a bias in favor of the Sheriff.

Easterday's speech, uttered about and during a political race, was neither potentially nor actually disruptive. Easterday was terminated pursuant to a sheriff's department written policy which forbade any speech critical of the Sheriff. That is the essence of this Petition. Easterday was fired because he violated an unconstitutional policy. As stated by the court in *Sheppard v. Beerman*, 94 F.3d 823, 827 (2nd Cir. 1996):

> . . . it matters not that the potential disruption outweighs the value of the speech if the employer subjectively makes the speech the basis of his termination decision: such retaliatory discharge is always unconstitutional.

Respectfully submitted,

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APPENDIX A — ORDER OF DISMISSAL OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA, PENSACOLA DIVISION FILED MARCH 10, 1994

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

CIVIL ACTION NO. 93-30628/LAC

PAUL EASTERDAY,

Plaintiff,

v.

LARRY GILBERT and SHERIFF, OKALOOSA COUNTY, FLORIDA,

Defendant.

ORDER OF DISMISSAL

Plaintiff has brought this suit under 42 U.S.C. § 1983, alleging that the defendant, Sheriff of Okaloosa County Florida, violated plaintiff's constitutional right to freedom of speech under the First Amendment when he discharged plaintiff from his employment as a deputy sheriff for making a derogatory comment about the Sheriff in the presence of other deputies. In making the statement, plaintiff expressed his opinion that "Gilbert had never been a cop and, therefore, shouldn't be sheriff." Defendant has moved to dismiss the complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure. Upon review of the relevant law, the Court concludes that dismissal is appropriate.

Appendix A

Although a state may not impinge upon an employee's First Amendment rights, neither is a public employee's right to freedom of speech absolute. *Bryson v. City of Waycross,* 888 F.2d 1562, 1565 (11th Cir. 1989), *reh'g. denied,* 894 F.2d 414 (1990). The determination of whether a state employer has violated an employee's right to free speech must be made under a four-part test, part of which involves a balancing process. *Id.* The balancing approach was adopted by the Supreme Court in an effort to strike a balance between the competing interests of the employee in commenting on matters of public concern on the one hand and the employer in promoting the efficiency of the public services it performs through its employees on the other. *Id.* (quoting, *Pickering v. Board of Education,* 391 U.S. 563, 568, 88 S. Ct. 1731, 20 L. Ed. 2d 811 (1968)).

As a threshold matter, the four-part test requires a determination of whether the employee's speech constitutes a matter of public concern. *Bryson,* 888 F.2d at 1565 (quoting, *Rankin v. McPherson,* 438 U.S. 378, 384, 107 S. Ct. 2891, 97 L. Ed. 2d 315 (1987)) (quoting, *Connick v. Myers,* 461 U.S. 138, 146, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983)). In making this determination, the statement is not to be considered in isolation; the content, form, and context of the employee's speech are relevant. *Rankin,* 483 U.S. at 384-85.

Once it finds this initial step satisfied, the court then must employ the *Pickering* balancing analysis to determine if the employee's interest in speech outweighs the employer's interest in "effective and efficient fulfillment of its responsibilities to the public." *Connick,* 461 U.S. at 150; *see Bryson,* 888 F.2d at 1565 ("public employee's interests are limited by state's need to preserve efficient government functions"). Again, the statement is not to be considered in a vacuum. Rather, the court

should examine the manner, time, and place of the expression, as well as the context in which the dispute arose. *Rankin*, 483 U.S. at 388. The Supreme Court has recognized several considerations as being relevant to the balancing analysis: "whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise." *Id.*

If, after performing the balancing analysis, the court concludes that the employee's interest outweighs that of the employer, the court, or finder of fact,[1] then determines whether the speech played a " 'substantial part' " in the employer's decision to demote or discharge the employee. *Bryson*, 888 F.2d at 1565. If the employee prevails in this regard, then as a final matter, the state is required to prove by a preponderance of the evidence that " 'it would have reached the same decision . . . even in the absence of the protected conduct.' " *Id.* at 1566.

Applying the above test to the instant case, the Court concludes that the defendant did not violate plaintiff's First Amendment right to freedom of speech by discharging him. At the outset, the Court finds that the statement constituted a matter

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1. Although the third and fourth prongs of the test are matters for the finder of fact, the issue of whether the speech constitutes a matter of public concern and the *Pickering* balancing analysis are both questions of constitutional law for the court. *Bryson v. City of Waycross*, 888 F.2d 1562, 1566 n. 2 (11th Cir. 1989), *reh'g. denied*, 894 F.2d 414 (1990); *Deremo v. Watkins*, 939 F.2d 908, 910 (11th Cir. 1991); *Huang v. Board of Governors of University of North Carolina*, 902 F.2d 1134, 1140 (4th Cir. 1990) (citing, *Joyner v. Lancaster*, 815 F.2d 20, 23 (4th Cir.), *cert. denied*, 484 U.S. 830, 108 S. Ct. 102, 98 L. Ed. 2d 62 (1987)).

of public concern. The statement suggested that the defendant was unfit, or not qualified, to hold the Office of Sheriff, and was made during a time in which the defendant was seeking re-election. The Eleventh Circuit has held that such speech, that which is directed to public issues or candidates running for public office, "invariably address[es] matters of public concern because it is 'the unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' " *Stough v. Gallagher,* 967 F.2d 1523, 1527 (11th Cir.), *reh'g. denied,* 978 F.2d 718 (1992).

Next, the Court concludes, upon examination of the circumstances surrounding the statement, that defendant's interest in maintaining the efficient operation of his department outweighs plaintiff's right to comment on defendant's lack of qualification to hold the title of Sheriff. In line with the Supreme Court's analysis in *Rankin,* the Eleventh Circuit has set forth three criteria relevant to the *Pickering* balancing process: (1) whether the *speech at issue* impede's the government's ability to perform its duties efficiently, (2) the manner, time, and place of the speech, and (3) the context within which the speech was made. *Bryson,* 888 F.2d at 1567 (citing, *Morales v. Stierheim,* 848 F.2d 1145, 1149 (11th Cir. 1988), *cert. denied sub nom., Leon v. Avino,* 489 U.S. 1013, 109 S. Ct. 1124, 103 L. Ed. 2d 187 (1989)).

Turning to the first and second criteria, the Court finds that plaintiff's statement had the potential[2] to impede the efficient

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2. The fact that the statement may not have *actually* caused any disruption is immaterial. The Supreme Court has held that it is not necessary

> for an employer to allow events to unfold to the extent that the disruption of the office and the destruction of

(Cont'd)

functioning of the Sheriff's Department. Without question, a properly functioning sheriff's department depends, in large part, on the close working relationships between the deputies themselves and between the deputies and the Sheriff himself. Public insubordination cannot be tolerated, for it has the potential to foster dissension in the ranks, and dissension among the deputies would undoubtedly impair the personal loyalty and confidence which are so crucial to the efficient functioning of any sheriff's department. The Supreme Court has held that if such conditions are presented by the facts of a particular case, courts should afford "a wide degree of deference to the employer's judgment." *Connick,* 461 U.S. at 151-52.

The fact that plaintiff's statement impeded the efficient functioning of the defendant's office is even more evident upon examination of the time, place, and manner in which the it was delivered. Plaintiff made the statement to his fellow deputies just prior to a shift meeting, while on duty and in uniform.[3] *See Bryson,* 888 F.2d at 1567 (held speech unprotected when employee "chose to spend police department time broadcasting his rancor").

(Cont'd)

working relationships is manifest before taking action.

Connick v. Myers, 461 U.S. 138, 152, 103 S. C.t 1684, 75 L. Ed. 2d 708 (1983).

3. This fact distinguishes the case from *Waters v. Chaffin,* 684 F.2d 833 (11th Cir. 1982), where the officer made the statement to a friend while off duty. If the instant case contained similar facts, the Court would not hesitate to find the speech protected.

Appendix A

With respect to the third criterion, requiring an examination of the context within which the statement was made, the statement was essentially a challenge to the defendant's ability to effectively carry out the duties of the office. As such, the statement was not limited to a personal dispute. *See id.* (recognizing that " 'additional weight must be given to the supervisor's view that the employee has threatened the authority of the employer to run the office' ").

Based on the Court's conclusion that plaintiff's statement is not protected speech for which the defendant was forbidden from discharging him, the Court finds dismissal appropriate. Accordingly, defendant's motion to dismiss (doc. 6) is GRANTED and the case is DISMISSED, with prejudice.

DONE and ORDERED this 10th day of March 1994.

s/ Lacy A. Collier
Lacy A. Collier
U.S. District Judge

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA FILED JUNE 6, 1995

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-2468

D.C. Docket No. 93-30628/LAC

PAUL EASTERDAY,

Plaintiff-Appellant,

versus

LARRY GILBERT, SHERIFF, OKALOOSA COUNTY, FLORIDA,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Florida

(June 6, 1995)

Before DUBINA, Circuit Judge, RONEY and ESCHBACH*, Senior Circuit Judges.

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* Honorable Jesse E. Eschbach, Senior U.S. Circuit Judge for the Seventh Circuit, sitting by designation.

Appendix B

PER CURIAM:

Accepting as true the facts alleged in Paul Easterday's claim under 42 U.S.C. § 1983 in which he contended his employment was wrongfully terminated because he exercised his constitutionally protected right of free speech, we hold that the district court prematurely dismissed the complaint on a 12(b)(6) motion after applying a *Pickering* balancing test and determining that Easterday's speech was not protected. *Pickering v. Board of Education,* 391 U.S. 563, 568 (1968).

Rule 12(b)(6) of the Federal Rules of Civil Procedure provides the trial court, on motion, may dismiss a complaint for failure to state a cause of action. In reviewing the dismissal of a complaint under this rule, we follow the same standards applicable to the trial court. We must accept as true all well-pleaded facts in the complaint and all reasonable inferences drawn therefrom. *Oladeinde v. City of Birmingham,* 963 F.2d 1481, 1485 (11th Cir. 1992), *cert. denied,* 113 S.Ct. 1586 (1993). A court may not dismiss a claim unless "it appears to a certainty that no relief can be granted under any set of facts that can be proved in support of the complaint's allegations." *Arnold v. Board of Education of Escambia County,* 880 F.2d 305, 309 (11th Cir. 1989).

Easterday, formerly a deputy sheriff of Okaloosa County, Florida, alleged he was fired by Sheriff Larry Gilbert eight days after remarking to three or four other deputies prior to their shift meeting that "Gilbert had never been a cop and, therefore shouldn't be a sheriff." At the time, Gilbert was campaigning for re-election in a contested political race. The Sheriff told Easterday he was fired for violating a departmental policy which states: "Members shall not publicly criticize or ridicule the

department, its policies, or any of its members." Easterday claims Gilbert's actions were retaliatory for expressing his political opinion about the sheriff's qualifications for office. According to his complaint, Easterday made the comment one time only, solely in the presence of the deputy sheriffs he worked with, and gave the sheriff a written apology later that day. Easterday claims the statement "was in no manner disruptive of the Sheriff's Office."

To state a claim for relief under section 1983, Easterday had to allege specific facts that show that the defendants, acting under color of state law, deprived the plaintiff of rights secured by the Constitution or federal statutes. 42 U.S.C. § 1983; *Arnold,* 880 F.2d at 309 (this Circuit's heightened pleading standard for § 1983 cases). The First Amendment protects public employees' right to speak about issues of public concern. Whether a public employee's conduct is constitutionally protected involves balancing the employee's interest as a citizen in commenting on matters of public concern with the interest of the state as an employer in promoting the efficiency of the public services it performs. *Pickering,* 391 U.S. at 568.

The district court held that Easterday's speech could be "fairly characterized as constituting speech on a matter of public concern." *Connick v. Myers,* 461 U.S. 138, 146 (1983). The court concluded, however, that the sheriff's interest in maintaining the efficient operation of his department outweighed Easterday's right to comment on his lack of qualification to be sheriff. Citing our decision in *Bryson v. City of Waycross,* 888 F.2d 1562, 1567 (11th Cir. 1989), the district court found that it was sufficient that Easterday's statement had "the potential to impede the efficient functioning of the Sheriff's Department."

Appendix B

The *Pickering* balancing analysis requires a court to make factual determinations regarding whether the speech at issue impedes the government's ability to efficiently perform its duties based on the manner, time, and place of the speech and the context in which it was made. *Bryson,* 888 F.2d at 1567. Since the Supreme Court has not laid down a general legal standard, each situation must be evaluated on a case-by-case basis. *Pickering*, 391 U.S. at 569. It would appear to be unusual for a case involving the *Pickering* analysis to be dismissed on the pleadings. The parties have not cited nor has our research revealed any court of appeals that has sustained a 12(b)(6) dismissal under similar circumstances. *Cf. Terry v. Cook,* 866 F.2d 373 (11th Cir. 1989) (affirming dismissal using different analysis developed for cases in which employees are discharged for political patronage); *Sanguigni v. Pittsburgh Board of Public Education,* 968 F.2d 393 (3rd Cir. 1992) (affirming district court's finding that teacher's statements in faculty newsletter were not a matter of public concern); *Hall v. Ford,* 856 F.2d 255 (D.C. Cir. 1988) (affirming dismissal using balancing test but requiring less-stringent government burden of proving interference due to athletic director's policymaking role).

Reading the allegations favorably to the plaintiff, the district court was premature in dismissing Easterday's complaint for failure to state a claim on which relief *might* be granted. *Oladeinde,* 963 F.2d at 1486. There is nothing in the complaint to substantiate the determination that Easterday's statement might have a potentially disruptive effect on the sheriff's office. Easterday's complaint, which we must accept as true, asserts that there was no disruptive effect.

To be treated as a motion for summary judgment, notice would have to be given to the parties under F.R.C.P. 56.

VACATED AND REMANDED.